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The Child in Trouble: The Long and Difficult Road to Reforming the Crazy-Quilt Juvenile Justice System

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THE TYRRELL WILLIAMS MEMORIAL LECTURE

The Tyrrell Williams Memorial Lecture was established in 1948 by the family and friends of Tyrrell Williams, a distinguished member of the faculty of the Washington University School of Law from 1913-1946. Since its inception, the Lectureship has provided a forum for the discussion of issues significant to the legal community. Former Tyrrell Williams Lecturers include some of the nation's most distinguished legal scholars, judges, and practicing attorneys.

The Honorable Irving R. Kaufman, distinguished jurist and scholar, delivered the Tyrrell Williams Memorial Lecture on March 24, 1982, on the campus of Washington University in St. Louis, Missouri. The following article is an expanded version of that lecture.

THE CHILD IN TROUBLE: THE LONG AND DIFFICULT ROAD TO REFORMING THE CRAZY-QUILT JUVENILE JUSTICE SYSTEM

Irving R. Kaufman*

I. INTRODUCTION

Like the Gordian knot, the problems affecting youth in our society have been unyielding. Attempts to unravel the tangled skein of difficulties facing troubled children have not yet provided systematic solu-

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tions to child abuse and juvenile crime. Helpless at birth, slow to mature, children obviously need protection and nurturing for a long time.[1] Recognizing that children develop best when raised by their parents,[2] and that there are many approaches to raising children,[3] society has acknowledged that parents should have primary responsibility for providing protection and guidance. Accordingly, society's rules governing state intervention to correct problems such as abuse and neglect of children have long been characterized in theory by a preference for family autonomy.[4]

We have failed, however, to integrate our understanding of the fundmentals of effective child-rearing into a framework of rules that would permit the state to intervene. A near epidemic of child abuse and neglect[5] is evidence of the limitations of a policy favoring unrestricted family automony. At the same time, where the state has ventured to help abused or neglected children, juvenile authorities have too frequently unjustifiably interfered with families in pursuit of an illusory rehabilitative ideal.[6]

The failures of our antiquated juvenile justice system extend far beyond our inability to remedy the problem of child abuse. Like King Canute who stood on the shore commanding the waves to cease pounding, reformers have been helpless to stem the tide of juvenile crime.[7] Juvenile offenders today are younger than their predecessors and are committing more violent offenses.

A recent study in The New York Times on juvenile crime noted a most striking case. Harold "Pee Wee" Brown began his life of crime at the age of five when he was truant from kindergarten for three months. When he attended, he terrorized his peers and robbed them of their lunch money. The violence of his crimes grew, and between the ages of eleven and fifteen Pee Wee was arrested fifteen times on charges rang-

1. Wald, Book Review, 78 MICH. L. REV. 645, 645 (1980).

2. *Id.*

3. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); *Developments in the Law—The Constitution and the Family,* 93 HARV. L. REV. 1156, 1351 (1980) [hereinafter *Developments in the Law*].

4. INSTITUTE OF JUDICIAL ADMINISTRATION AND AMERICAN BAR ASSOCIATION, JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO ABUSE AND NEGLECT 1.1 (1981) [hereinafter IJA/ABA STANDARDS].

5. *See infra* text accompanying notes 13-14.

6. Kaufman, Book Review, 90 HARV. L. REV. 1052, 1059 (1977). For a discussion of the "rehabilitative ideal," see F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 25-41 (1964).

7. *See infra* text accompanying notes 10-12.

ing from assault to sodomy. Pee Wee willingly admitted that these arrests were for only a small number of his crimes. Indeed, he claimed that when he was thirteen he shot and killed a man on a deserted Brooklyn street corner but was never caught. Now twenty, he is serving a prison term for another murder.

Every day the media graphically recounts tragic stories of violent crimes committed by minors—a fourteen-year-old who shot an eighteen-year-old to death after the latter refused to relinquish his $150.00 gold ring; a seventeen-year-old who murdered a man shortly after the youth was released from custody on the recommendation of psychiatrists and social workers, despite his history of emotional disturbance and juvenile crime. Instances such as these fall within the ambit of the juvenile courts, which are overwhelmed by a mountain of cases involving youthful offenders.

Courts have responsibilities concerning children in addition to resolving cases of juvenile crime and child abuse. In child custody cases, judges often confront difficult jurisdictional issues as well as the conflicting interests of the child and his parents when divorce requires a realignment of the parents' custodial rights.[8] These cases often require great resourcefulness on the part of judges. In one recent case, the judge decided that it would be unfair to award custody of the children exclusively to either parent. Accordingly, the children remained in the family home, and the parents alternated living with the children. The well-publicized case of Walter Polovchak, a fourteen-year-old boy, provides another telling illustration of these issues. Polovchak turned to the courts for relief after running away from home in Chicago rather than returning with his parents to the Soviet Union. Local authorities supported Walter, and the Carter Administration granted him asylum. The Reagan Administration renewed Washington's pledge to Walter. Recently, an Illinois appellate court reversed a lower court's ruling which made Walter a ward of the Cook County Juvenile Court. The appellate court decided that because Walter was not in any physical or mental danger,[9] the state had violated the Polovchaks' civil rights by intervening in the internal affairs of the family. It is true that few custody cases involve such high political stakes. Yet all of them are matters of equally intense personal concern, and the courts in every case

8. *See Developments in the Law*, *supra* note 3, at 1314.
9. N.Y. Times, Dec. 31, 1981, § A, at 1, col. 1.

must strike a delicate balance among the interests of the child, the parents, and the State.

These few cases are not isolated incidents. Since 1960, arrests of juveniles for violent crimes have increased by nearly 250%, more than double the comparable figure for adults during the same period.[10] While children under the age of eighteen constitute only 14.6% of the nation's population, they account for more than 50% of all arrests for property crime.[11] In the schoolhouse, where 68% of the robberies and 50% of the assaults on youths between the ages of twelve and fifteen occur, an estimated 282,000 students and 5,200 teachers are physically attacked each month.[12] During the 1974-75 school year, officials confiscated sixty-five weapons in New York City schools. In 1980-81, that number rose to 433, and the reign of terror in the schools proves that this is only a small fraction of the weapons these youths actually possess.

In their innocent role, juveniles fare no better than other victimized groups in society. Children who are the victims of abuse and neglect constantly fall through the cracks of the juvenile bureaucracy. More than 500,000 cases of child abuse are reported annually, and authorities estimate that at least 1.5 million more incidents go unreported. Incest remains an intractable problem, shattering in its consequences and often nearly impossible to detect. Furthermore, children enmeshed in child-custody battles await what may be the most significant decision in their lives. Such battles have become increasingly frequent, as the proportion of marriages ending in divorce has reached 40%.[13] Because the family "imparts ethical norms, providing the child with his first instruction in the prevailing social rules, [and] profoundly shapes his charac-

10. Kaufman, *supra* note 6, at 1053. *See generally* ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT, 81-85 (1981). This study indicates that juveniles commit more than 20% of the violent crimes against individuals. Statistics for the urban ghetto and for schools are particularly disheartening. Gang violence creates an atmosphere of terror in many poor neighborhoods. The Attorney General's Task Force estimated that disruptive youth groups may involve as many as 20% of adolescent males in cities of more than 10,000 population and that 71% of all serious crimes by youths are committed by gang members. *Id.* at 84.

11. *See* ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT, *supra* note 10, at 81.

12. *Id.*

13. U.S. BUREAU OF THE CENSUS, DEPT. OF COMMERCE, Series P-23, No. 84, DIVORCE, CHILD CUSTODY AND CHILD SUPPORT 1 (1979). In 1978 there were 2.2 million marriages and 1.1 million divorces. *Id.*

ter,"[14] failings of courts in the child custody area exacerbate other social problems, such as child abuse and juvenile criminality.

In this article, I will outline a comprehensive approach toward reforming the juvenile justice system to enable it to better serve the needs of society and the child. To structure the inquiry that follows, I will briefly describe the major themes which run through all these cases, and which must be understood if meaningful and comprehensive reform is to be undertaken.

In cases involving juveniles, courts are confronted with the tensions among the rights of the child, the rights of parents, and the interests of the state. These conflicts are heightened when our concern focuses on safeguarding the rights of minors because the very concept of a right presupposes that we can describe its source and nature, determine how it can be enforced, and define its boundaries.[15] For example, it is meaningless to say that children have an absolute right to control their own destiny, or make basic decisions involving fundamental liberties because children also need special protection[16] and may not always have the maturity to assert their own rights. While courts have long held that the right to marry is a fundamental liberty in cases involving adults,[17] the United States Court of Appeals for the Second Circuit, in a recent case, upheld restrictions imposed by the State of New York on the right of minors to marry without parental consent.[18] As a result, the child's right to any specific form of treatment by the state must be shaped in light of the parents' traditional right to custody and control of their child.[19] As we shall see, this parental right has assumed constitutional dimension.[20] Yet parents often fail to live up to society's expectations, and society has both an interest, as parens patriae, in

14. C. LASCH, HAVEN IN A HEARTLESS WORLD 3 (1977), *cited in Developments in the Law, supra* note 3, at 1159.

15. Kaufman, *Protecting the Rights of Minors: On Juvenile Autonomy and the Limits of Law,* 52 N.Y.U. L. REV. 1015, 1019 (1977).

16. Wald, *supra* note 1, at 645. *But see* R. FARSON, BIRTHRIGHTS (1974) (asserting that society's protective attitude toward children is ill-advised, since children mature when given individual liberty and responsibility, not protection and sheltering).

17. *See, e.g.,* Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage is a fundamental privacy right protected by the due process clause of the United States Constitution); Loving v. Virginia, 388 U.S. 1 (1967) (antimiscegenation statute infringed constitutionally protected right to marry).

18. Moe v. Dinkins, 669 F.2d 67 (2d Cir. 1982).

19. *See, e.g.,* Stanley v. Illinois, 405 U.S. 645, 658 (1972); Prince v. Massachusetts, 321 U.S. 158, 170 (1944).

20. *See infra* text accompanying notes 93-98.

ensuring that a child receives adequate care[21] and an interest in maintaining social order.[22]

Another correlative principle is at work. The rights of a child require special protection because they belong to a person generally considered unable to assert them.[23] But disability by reason of youth may not alone justify state intervention in the best interests of the child, since there are different levels of maturity and degrees of disability. Even in difficult cases in which the individual juvenile is immature or the choice is highly significant, a child should still have the right to be free from state intervention, provided that the child's choice can be made by a surrogate decisionmaker—such as a parent—whose interests track those of the minor.[24] The corollary of this principle is that different levels of protection by the state will be required depending on the nature of the child's right, with more stringent protections required for individuals where it is likely that the interests of the parents and child will conflict.[25]

An additional theme that emerges is the need to focus on the family, our society's primary institution for developing a child's potential.[26] The risk of antisocial behavior by the child increases when the family is unsuccessful in, or prevented from, providing the essential framework for the child's growth. Attention to that reality calls for what I have labeled a "new pragmatism,"[27] whose fundamental tenets are that (1) coercive intrusion into the life of the child and the automony of the family requires sound justification; and (2) intervention is ineffective and may be harmful, if not designed to integrate the juvenile into his family and the social fabric. The family must be convinced that the state's involvement is essential to the process of rehabilitation.[28]

From what I have said it would appear that still another theme must

21. *See* Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases,* 63 GEO. L.J. 887, 893-910 (1975).

22. *See id.*; S. KATZ, WHEN PARENTS FAIL (1971); Wald, *supra* note 1, at 646.

23. Garvey, *Freedom and Choice in Constitutional Law,* 94 HARV. L. REV. 1756 (1981).

24. IJA/ABA STANDARDS, *supra* note 4, Introduction to Standards Relating to Rights of Minors, at 1-6 (1980); Kaufman, *supra* note 15, at 1021.

25. *See generally* Garvey, *supra* note 23.

26. *See* THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 45 (1967); *Developments in the Law, supra* note 3, at 1159.

27. Kaufman, *supra* note 6, at 1055.

28. IJA/ABA STANDARDS, *supra* note 4, A Summary and Analysis 23 (Tent. ed. 1977). *See also* Kaufman, *Prison Reform: A View From the Bench,* 67 A.B.A. J. 1470, 1471 (1981).

be recognized. I refer to the overriding need to undertake a sweeping restructuring of the existing juvenile justice system. Reform must be based on the fundamental premise that the prescription of treatment or services by juvenile authorities is not inherently beneficial to the juvenile and should be utilized with restraint.[29] Institutionalization, much closer to punishment than to treatment, must not masquerade as rehabilitation. Accordingly, I will detail a variety of fundamental changes in the framework of the juvenile justice system which could take us a long way down the road to needed reforms. It will become clear that the central shortcoming in our efforts to help the child in trouble is the absence of a comprehensive system with centralized authority over all aspects of the child's interaction with the law. In this connection, I will suggest proposals for unifying the system's remedial efforts and eliminating gaps and duplication in services. The linchpin of this comprehensive reform would be the creation of a coordinating organization, requiring, as a first step in each case, the assignment of juvenile cases to trained impartial overseers whose focus will be the rehabilitation of the family.[30]

Reform for the future requires an understanding of the past. Accordingly, a brief history of society's approach to juvenile justice will provide insight into the reasons for the current shortcomings of the system and the necessary direction for reform.

II. THE HISTORICAL DEVELOPMENT OF THE JUVENILE JUSTICE SYSTEM

A. Pre-Nineteenth Century

Before the reform movement of the nineteenth century, juveniles who were not accused of committing crimes, but were vagrants or without adequate homes were dealt with pursuant to practices that were the historical vestiges of the Elizabethan poor law system. These children were placed in poorhouses and almshouses, and treated as indentured servants.[31] Children accused of committing crimes were dealt with by the same institutions having jurisdiction over adults, although modified rules of criminal responsibility were applied for the adolescent. If

29. IJA/ABA STANDARDS, *supra* note 4, A Summary and Analysis 23 (Tent. ed. 1977).

30. *See infra* text accompanying pt. IV, B.

31. *See* J. HAWES, CHILDREN IN URBAN SOCIETY: JUVENILE DELINQUENCY IN NINETEENTH CENTURY AMERICA (1971).

found guilty, juveniles were incarcerated in prisons along with adult offenders. In short, the rudimentary efforts of pre-nineteenth century society to address the problems of the juvenile were characterized by a sharp separation between the child as criminal and the child as the victim of poverty or abusive parents.[32]

B. Nineteenth Century

The reform movements of the nineteenth century brought significant changes in the juvenile justice system. In 1825, the New York legislature founded the New York House of Refuge to care for "novices in antisocial conduct."[33] Locking juvenile criminals and so-called "status offenders," such as vagrants, behind the same bars was justified by a philosophy that traced the causes of all types of juvenile problems to poverty and social deprivation. This philosophy and the failure to distinguish between delinquent and neglected children[34] came to justify a drive to impose middle-class values upon the children in trouble, who were often the offspring of recent immigrants.[35]

While this social welfare objective provided social and political justification, the theoretical justification for subjecting delinquent children to coercive state commitment was provided by the parens patriae doctrine. The parens patriae power had come to signify the state's limited paternalistic power to protect or promote the welfare of certain individuals, like young children, who lacked the capacity to act in their own best interests.[36]

Early nineteenth century courts invoked the parens patriae doctrine to uphold broad child neglect and delinquency statutes that permitted sweeping state-initiated intervention into the family.[37] Furthermore, these statutes generally contained vague substantive standards, and insufficient procedural safeguards such as parental notice and opportu-

32. *See* W. FRIEDLANDER, INTRODUCTION TO SOCIAL WELFARE (3rd ed. 1968).

33. *See* Fox, *Juvenile Justice Reform: An Historical Perspective,* 22 STAN. L. REV. 1187, 1187 (1970); Marks, *Juvenile Noncriminal Misbehavior and Equal Protection,* 13 FAM. L.Q. 461, 462 (1980).

34. *See* Fox, *supra* note 33, at 1192-93; *Developments in the Law, supra* note 3, at 1225.

35. *See* Fox, *supra* note 33, at 1201-02.

36. *See Developments in the Law—Civil Commitment of the Mentally Ill,* 87 HARV. L. REV. 1190, 1207-22 (1974). Beginning in Pennsylvania in 1838, courts invoked the parens patriae concept to justify the confinement of minors in a House of Refuge. *See Ex parte* Crouse, 4 Whart. 9 (Pa. 1838).

37. *See Developments in the Law, supra* note 3, at 1222-23.

nity to be heard.[38] Moreover, because the statutes did not distinguish the state's power to remove neglected or dependent children from their families from the power to incarcerate delinquent minors, the courts could not accurately assess the state's interest in intervention in any particular case. Accordingly, the courts failed to appreciate that in cases of neglect or dependency, where the child had not committed an antisocial act, the state's sole objective should have been promotion of the child's best interests.[39]

Because of the many serious abuses, nineteenth century humanitarians lobbied for reform that culminated in the passage of The Illinois Juvenile Court Act of 1899.[40] The Illinois Act, which established the first separate juvenile court in America, became the model for similar enactments in many other states. On first examination, it appears that the Act contained many provisions that would protect the rights of the juvenile, including establishment of a court for juveniles under age sixteen and separation of children from adult convicts confined in the same institution.[41] The Act also contained a provision, however, authorizing the court "to hear and dispose of the case in a summary manner."[42] In essence, this Act, coupled with the broad reach of the parens patriae doctrine, gave the juvenile court judge almost limitless discretion.

C. Twentieth Century

Beginning early in the twentieth century, a number of changes took place in the juvenile justice system. The jurisdiction of the juvenile court was gradually expanded. For example, states added noncriminal behavior—such as truancy—to the definition of delinquency. As a result, according to Anthony Platt, a noted expert in the field, juvenile court legislation "brought within the ambit of governmental control a set of youthful activities that had been previously ignored or handled

38. *See id.* at 1224-25.

39. *See id.* at 1225-26 & 1226 n.170. In acting pursuant to its parens patriae power, the state should advance only the best interests of the individual requiring state assistance and should not attempt to further other objectives deriving from the police power that may be antagonistic to the individual's welfare. *See* O'Connor v. Donaldson, 422 U.S. 563, 575 (1975).

40. Act of April 21, 1899, 1899 Ill. Laws 131-37 (no constitutional basis for confining otherwise harmless mentally ill).

41. For a discussion of the Illinois Juvenile Court Act, *see* Fox, *supra* note 33, at 1211.

42. Illinois Juvenile Court Act § 5, 1899 Ill. Laws 133 (1899) (repealed 1965). *See* Fox, *supra* note 33, at 1221.

informally . . . . drinking, begging, roaming the streets, frequenting dance halls and movies, fighting, sexuality, staying out late at night, and incorrigibility . . . ."[43]

In an attempt to eliminate the stigma attaching to juveniles adjudicated guilty of noncriminal misconduct, legislatures sought to create a separate classification for juveniles engaging in such conduct known as status offense jurisdiction. The New York legislature led the way with the creation of the classification known as PINS, or Person in Need of Supervision.[44] Other states followed suit. Yet this innovation did not solve the basic problem. Whether labeled a criminal or status offender, the adolescent found guilty bore a stigma, and correctional authorities and other experts could not devise appropriate remedies.

It became increasingly urgent to reform the juvenile justice system, and the cry for reform was nearly universal. This pressing need moved the Supreme Court to make an effort to change the system through due process guarantees. In 1966, in *Kent v. United States*,[45] the Court held that transfers from juvenile to adult court must be procedurally fair, and the following year, in *In re Gault*,[46] the Court held that juveniles accused of crimes have a right to certain minimum safeguards as a matter of due process.

Although improvements have been made,[47] the long history of abuses in the juvenile justice system has left us with a legacy of injustices: vague statutory standards; jurisdiction based on status or age rather than specific acts; indiscriminate intervention into the family and removal of children from the home; indeterminate and disproportionate sanctions; a "cure" prescribed without any understanding of the "illness"; and a lack of coordination among the participants in the process.[48]

Consider for a moment the state of the New York Family Court.

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43. A. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 139 (2d ed. 1977), *cited in* Garlock, *"Wayward" Children and the Law, 1820-1900: The Genesis of the Status Offense Jurisdiction of the Juvenile Court,* 13 GA. L. REV. 341, 344 (1979).

44. New York Family Court Act § 712(b) (McKinney 1962).

45. 383 U.S. 541, 554 (1966).

46. 387 U.S. 1 (1967).

47. For example, many courts have attempted to describe the types of constitutionally permissible environment that institutions must provide when juveniles are confined. *See, e.g.,* Morales v. Turman, 535 F.2d 864 (5th Cir. 1976); Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972).

48. *See* IJA/ABA STANDARDS, *supra* note 4, A Summary and Analysis 36 (Tent. ed. 1977).

Inadequately financed and understaffed—its twenty-eight judges are eleven short of the statutorily authorized thirty-nine—the court must handle tens of thousands of cases each year in such areas as juvenile delinquency, child support, paternity, and abuse and neglect. Many of the support personnel, law clerks, secretaries and others, are demoralized and are eager to be transferred. Many of the lawyers who practice before the court are considered to be among the most ineffective in New York City. Overwhelmed by the crushing caseload, the judges find it necessary to grant innumerable delays and dismiss as many as one-third of the cases. I will attempt to sketch the outlines of a comprehensive approach to restructuring the juvenile justice system, based on constitutional, statutory, and institutional reforms.

III. THE CONSTITUTION AND THE JUVENILE JUSTICE SYSTEM

The nature of the constitutional protections to which the juvenile has a right has long been the subject of heated debate.[49] While most commentators have focused on the procedural safeguards required by the due process clause in juvenile proceedings,[50] the Constitution also places broad constraints on the substantive provisions of the juvenile justice system.[51] The articulation of constitutional principles to govern attempts by the state to regulate juvenile behavior, or to decide which parent should have custody of a child is a most difficult enterprise. While the procedural safeguards applicable to juvenile proceedings can be adopted by reference to the procedures governing adult criminal proceedings, state attempts to regulate noncriminal misbehavior or to make custody decisions must be guided by two principles: first, children under a certain age are incapable of making decisions in their own best interests, and second, such governmental intervention does implicate the interests of child, parent, and state.[52] As we shall see, while the

49. *See, e.g.,* Burt, *Developing Constitutional Rights Of, In, and For Children,* LAW & CONTEMP. PROBS., Summer 1975, at 118; Tribe, *Childhood, Suspect Classifications, and Conclusive Presumptions: Three Linked Riddles,* LAW & CONTEMP. PROBS., Summer 1975, at 8.

50. *See, e.g.,* Davis, *The Efficacy of a Probable Cause Requirement in Juvenile Proceedings,* 59 N.C.L. REV. 723 (1981); Note, *Preadjudicatory Confessions and Consent Searches: Placing the Juvenile on the Same Constitutional Footing as an Adult,* 57 B.U.L. REV. 778 (1977); Note, *Violent Juveniles: The New York Courts and the Constitution,* 11 COLUM. HUM. RTS. L. REV. 51 (1979).

51. *See* Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work,* 51 S. CAL. L. REV. 769, 770 (1978); *Developments in the Law, supra* note 3, at 1235-42.

52. *See Developments in the Law, supra* note 3, at 1161-66, 1198-1227; Garvey, *supra* note 51, at 771.

articulation of basic constitutional rights is an essential framework, other reforms are necessary to structure a fair and workable juvenile justice system.

A. Procedural Due Process

One source of constitutional restrictions on state laws affecting juveniles is procedural due process. In the area of juvenile delinquency, the courts have held that adolescents have a right to certain minimum procedural safeguards. In *In re Gault*,[53] the Supreme Court held that juveniles facing possible incarceration as a result of delinquency charges have a constitutional right to notice, counsel, and cross-examination, and a privilege against self-incrimination.[54]

The Court reaffirmed the validity of *Gault* in later cases, holding that the standard of proof of guilt used in adult criminal trials—proof beyond a reasonable doubt—must also be used in juvenile delinquency proceedings whenever the minor is subject to incarceration.[55] The Court also held that the double jeopardy clause prevents prosecution in criminal court after an adjudication in juvenile court.[56] *Gault* and its progeny might then be taken to stand for the principle that an individual's interest in procedural safeguards for his or her liberty interest is neither age-dependent, nor deserving of less stringent protection if he or she is a minor.[57]

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53. 387 U.S. 1 (1967).

54. *Id.* at 31-57. *See Developments in the Law, supra* note 3, at 1227-28.

55. *In re* Winship, 397 U.S. 358, 365-68 (1970).

56. Breed v. Jones, 421 U.S. 519 (1975). *But see* McKeiver v. Pennsylvania, 403 U.S. 528, 543-51 (1971) (full range of protections applicable in adult criminal proceedings—in this case, the right to a jury trial for delinquency charges—is not required in juvenile proceedings).

57. *See* Garvey, *supra* note 51, at 775. The argument has been made that the special characteristics of the juvenile mean that he or she has a reduced liberty interest meriting protection in the form of procedural safeguards. It is also argued that it is less intrusive to control a child's behavior than an adult's, because the child normally has less latitude to determine his or her own actions in our society than an adult. Accordingly, it is argued that a child is less likely to perceive a deprivation of liberty to be offensive than an adult. Even if the child did not perceive coercive intervention as a deprivation of liberty, a most unlikely result in the case of incarceration, parents would undoubtedly be troubled by the state's intrusion into the affairs of their family. It must be remembered that the parents also have a protectible interest in the fair adjudication of any charges against their child which could result in the loss of custody. *See id.*, at 776. In *Gault*, the Supreme Court stated that notice of the charges against the juvenile must be provided, in large part, because the "parents' right to his custody [is] at stake." 387 U.S. at 33-34. Pursuant to *Gault*, the state must notify the parents and the child of the right to counsel, a right shared by parent and child. *Id.* at 41-42. Finally, *Gault* instituted another procedural safeguard by holding that a waiver of the privilege against self-incrimination depends not only upon the age and competence

The state cannot avoid providing basic procedural protections by assuming that juvenile authorities' actions "in the child's best interest" cannot cause the child to suffer the same degree of harm flowing from adult criminal proceedings. While separate juvenile courts were originally established in large part to avoid the stigma attaching to the imposition of the adult criminal sanctions, it cannot be disputed that serious consequences attend adjudication of a child as a juvenile delinquent. In addition to the psychological effects and stigma of being labeled a delinquent, a child may later be denied employment opportunities because employers may gain access to records of juvenile proceedings. If the child is incarcerated, emotional and intellectual development may be seriously impaired by the conditions of juvenile institutions. Accordingly, the child's liberty interest, joined with the parents' interest in controlling their children's upbringing, warrants the safeguards mandated by procedural due process in juvenile delinquency proceedings.

Gault and its offspring suggest that courts should "candidly appraise" the state's assertion of the parens patriae power to deny minors procedural safeguards in juvenile delinquency proceedings. The child's interest in avoiding unjustified state intervention and the parents' interest in maintaining family integrity indicate that parental termination or abuse and neglect proceedings also merit stringent procedural due process protections. While the Supreme Court has not applied the panoply of the *Gault* protections to such proceedings,[58] several lower courts have held that a minor who is the subject of a parental termination proceeding has a right to certain procedural safeguards.[59] Recently, however, the Supreme Court indicated that it may be reluctant to require the same degree of protections mandated in the juvenile delinquency context in other types of cases involving children.

In 1979, the Court in *Parham v. J.R.*,[60] held that children who are

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of the child, but also on "the presence and competence of parents." *Id.* at 55. The procedural due process protections of the fourteenth amendment mandate procedural safeguards in juvenile delinquency proceedings, then, because it is recognized that both the interests of parent and child have the same objective—the fair adjudication of charges against the juvenile.

58. *See* Lassiter v. Department of Social Servs., 452 U.S. 18 (1981) (no absolute right to counsel in parental termination proceedings).

59. *See, e.g.,* Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976); Ricketts v. Ricketts, 576 S.W.2d 932 (Ark. 1979). *See generally* Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings,* 11 HARV. C.R.-C.L. L. REV. 565 (1976).

60. 442 U.S. 584 (1979).

wards of the state have no constitutional right to a formal hearing upon being voluntarily admitted to a mental institution by a state agency.[61] While conceding that the child has a substantial liberty interest in not being committed wrongly or unnecessarily to a mental institution,[62] the Court seemed to accord less weight to this interest than to the interest of a child in avoiding incarceration as a juvenile delinquent.[63] The Court reasoned that the denial of a formal hearing for minors prior to commitment was justified by "the statutory presumption that the State acts in the child's best interest."[64] Since the best interests standard governs most state abuse and neglect proceedings, one could fear that the Court would adopt the same deferential approach in a case involving the question of what safeguards due process requires in these proceedings.

The Supreme Court has mandated at least one form of stringent protection in dependency and neglect proceedings. In many states, the standard of proof the state must meet in a dependency and neglect proceeding has been the preponderance of the evidence.[65] This standard is much less protective than the standard applied to juvenile proceedings in *In re Winship*,[66] which held that the state must prove its charges beyond a reasonable doubt. Recently, the Supreme Court in *Santosky v. Kramer*,[67] declared that a New York law permitting the state to remove children permanently from the custody of abusive or neglectful parents upon a showing of a "fair preponderance of the evidence" was unconstitutional. The Court ruled that due process requires the state to support its allegations by at least "clear and convincing evidence."[68] In light of the child's and parents' interests in avoiding unnecessary state

61. *Id.* at 613.

62. *Id.* at 600. *See also Developments in the Law, supra* note 3, at 1230.

63. 442 U.S. at 600-01.

64. *Id.* at 618. In *Parham*, the court applied the tripartite balancing test of Matthews v. Eldridge, 424 U.S. 319, 335 (1976), to determine what process was required in a precommitment formal hearing. The *Matthews* test called for a weighing of the child's interest, the risk of error and the degree of additional accuracy to be gained from procedural safeguard, and the state's interest in reducing its administrative costs. Parham v. J.R., 442 U.S. at 606. The Court concluded that the risk of mistake in having the child committed by a social worker without a hearing was too insignificant to warrant additional safeguards. *Id.* at 613-17.

65. *See, e.g.*, S.D. CODIFIED LAWS ANN. § 26-8-22.10 (1976); Comment, *Due Process and the Fundamental Right to Family Integrity: A Re-Evaluation of South Dakota's Parental Termination Statute,* 24 S.D.L. REV. 447, 460 (1979).

66. 397 U.S. 358 (1970).

67. 50 U.S.L.W. 4333 (March 24, 1982).

68. *Id.* at 4339.

intervention, the Court correctly held that the more stringent procedural due process protections should apply in abuse and neglect proceedings.

Procedural safeguards alone are but empty vessels when the underlying substantive rules affecting a child's liberty in juvenile delinquency proceedings or the termination of his association with his parents in abuse and neglect proceedings are vague and overbroad. For this reason, it is important to consider whether heightened protection may be afforded the rights of children and parents against state intervention into the family through other types of constitutional limitations on state parens patriae laws. I refer to the void-for-vagueness doctrine[69] and substantive due process.

B. Void for Vagueness

Today many state delinquency and neglect statutes contain broad and vague standards allowing juvenile courts nearly unbridled discretion to intervene in the family and the life of the juvenile. More than thirty states have statutes which authorize juvenile courts to determine custody with no more guidance than when custody would be in the "best interests of the child."[70] Abuse and neglect and noncriminal misbehavior statutes are often equally vague.[71]

The vague provisions of these statutes permit excessive interference

69. The void-for-vagueness doctrine was originally applied only to test the constitutionality of penal statutes. In Connally v. General Constr. Co., 269 U.S. 385 (1926), the Supreme Court stated that a statute "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Id.* at 391. The vagueness doctrine was subsequently extended to nonpenal statutes in *Giaccio v. Pennsylvania*, in which the Court held that the doctrine would apply when a statute deprived an individual of his liberty or property, whether the statute was labeled as criminal or civil. 382 U.S. 399, 402 (1966). *See* Comment, *supra* note 65. The state delinquency and neglect statutes that were passed in the nineteenth and early twentieth centuries contained broad and vague jurisdictional clauses enabling the juvenile courts to hear all types of cases involving children deemed in need of state supervision. *See Developments in the Law*, *supra* note 3, at 1231 & n.202.

70. *See Developments in the Law*, *supra* note 3, at 1232 n.204. In approximately 12 other states, the legislatures have not adopted a "best interests" standard, but have relied on their courts to fashion such a standard. *Id.*

71. *See, e.g.*, Day, *Termination of Parental Rights Statutes and the Void for Vagueness Doctrine: A Successful Attack on the* Parens Patriae *Rationale*, 16 J. FAM. L. 213 (1977-78); Stiller & Elder, *PINS—A Concept in Need of Supervision*, 12 AM. CRIM. L. REV. 33, 45-51 (1974). In Gesicki v. Oswald, 336 F. Supp. 371 (S.D.N.Y. 1971) (Kaufman, J.), a three-judge federal court held that a New York statute permitting the confinement of "wayward minors" to adult criminal correctional programs and facilities was unconstitutionally vague.

with family autonomy, and increase the likelihood of error in assessing the need for intervention.[72] A most telling illustration involves statutes regulating the so-called status offenses like truancy or failure to obey parents.[73] Under these statutes a juvenile may be punished, although he may have had no idea that his conduct constituted an offense. Likewise, many parents may not have adequate notice of what constitutes actionable abuse or neglect. Vague statutes may also allow the state to interfere with the exercise of other protected rights.[74] For example, broad parental termination provisions might be invoked in cases involving parents who have espoused unpopular views, thereby chilling first amendment rights.

While the Supreme Court has not invoked the void-for-vagueness doctrine to invalidate a state parens patriae law governing juvenile delinquency,[75] and most lower courts have rejected such attacks on these laws, several lower courts have invalidated child neglect laws on the basis of the vagueness doctrine.[76] In light of the traditional deference to the state in matters involving the family, however, most courts seem reluctant to overturn or limit state parens patriae laws that are clearly

72. *See* Comment, *supra* note 65, at 456.

73. *See* Ketcham, *Why Jurisdiction Over Status Offenders Should be Eliminated from Juvenile Courts,* 57 B.U.L. REV. 645 (1977); Rosenberg & Rosenberg, *The Legacy of the Stubborn and Rebellious Son,* 74 MICH. L. REV. 1097 (1976).

74. *See* Comment, *supra* note 65, at 456.

75. *See Developments in the Law, supra* note 3, at 1232-33 & 1233 n.209. The Supreme Court has consistently refused to address the issue of vagueness in juvenile statutes. *See, e.g.,* Mercado v. Rockefeller, 502 F.2d 666 (2d Cir.), *cert. denied,* 420 U.S. 925 (1974); *In re* Tomisita N., 30 N.Y.2d 927, 287 N.E.2d 377, 335 N.Y.S.2d 683, *appeal dismissed sub nom. In re* Negron, 409 U.S. 1052 (1972); Gonzalez v. Texas Dept. of Human Resources, 581 S.W.2d 522 (Tex. Civ. App. 1979), *cert. denied,* 445 U.S. 904 (1980).

76. *See Developments in the Law, supra* note 3, at 1233 n.211. For example, in Linn v. Linn, 203 Neb. 218, 286 N.W.2d 765 (1980), the Nebraska Supreme Court struck down a parental termination statute because the statute was so vague that parents were not provided with adequate notice of the kinds of behavior that could trigger state intervention. In Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976), the federal district court invalidated an Alabama statute which permitted termination of parental rights when the child was deemed to be "dependent or neglected." In *Conn*, a white woman with a child moved in with a black man in a black neighborhood. Although the child showed no signs of physical abuse and was properly cared for, the child, following a summary seizure order, was physically removed from his mother's care. The mother's custody rights were later terminated on the basis of the County Family Court's "factfinding" that "it was not a healthy thing for a white child to be the only [white] child in a black neighborhood." *Id.* at 775. A three-judge federal district court concluded that the Alabama statute unconstitutionally violated the fundamental right to family integrity, and that the statute was invalid on the basis of the void-for-vagueness doctrine. *Id.* at 779-80.

stated but merely overly broad.[77] Accordingly, while the vague statutes now in effect in many states could well be redrafted to achieve greater specificity and clarity, it seems likely that parents or children seeking relief from restrictive laws will be required to show that such laws interfere with substantive constitutional rights in order to obtain relief.

C. Substantive Due Process

The state's power to regulate the family derives from the police power and the parens patriae power. The police power is the general authority of a state to promote the health, safety, welfare, and morals of its citizens.[78] Thus, the state under the police power has an interest in enforcing a variety of laws relating to the family and children, as well as to the punishment of juvenile criminality. Such laws include statutes that provide for the termination of the rights of parents to the custody of their children,[79] and laws restricting the access of minors to abortions and contraceptives.[80]

At the same time, the state has sought to uphold a variety of restrictions on individual choice on the basis of its parens patriae power—the power of the state to take action to protect those unable to protect themselves, such as children or incompetents, in "their best interest."[81] The parens patriae concept is limited: it must be exercised only to further the best interests of the child,[82] not to promote other social goals. The state has often asserted an interest in fostering family autonomy, based on its parens patriae objective of advancing the best interests of children as well as its police power objective of ensuring the stability of

77. See *Developments in the Law*, *supra* note 3, at 1235.

78. *See* Jacobson v. Massachusetts, 197 U.S. 11, 24-25 (1905).

79. *See In re* Yardley, 260 Iowa 259, 149 N.W.2d 162 (1967).

80. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 692 (1977) (plurality opinion).

81. *See* Comment, *supra* note 65, at 451 & n.33; *Developments in the Law, supra* note 3, at 1221-25.

82. *See* Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW AND CONTEMP. PROBS., Summer 1975, at 226; *Developments in the Law, supra* note 3, at 1232 n.204. Two other limitations on the exercise of the parens patriae power can be readily discerned. First, since the parens patriae concept is based on the presumption that children lack the mental competence and maturity possessed by adults, *see* Carey v. Population Serv. Int'l, 431 U.S. 678 (1977); Wald, *Children's Rights: A Framework for Analysis,* 12 U.C.D. L. REV. 255 (1979), children who are both competent and mature possess fundamental rights that may be unconstitutionally abridged by the state acting under the color of its parens patriae power. Second, the state must show that the child's parents are either unfit, unable or unwilling to care for the child adequately. *See* Quilloin v. Walcott, 434 U.S. 246 (1978).

society.[83]

State deference to family autonomy is mandated not only by the practical constraints on the state's ability to achieve these objectives in other ways, but also by constitutional limits on its power to impose a preferred test of substantive values and beliefs on its citizens.[84] At the same time, we must keep in mind the distinction between state action to further its interests in promoting family autonomy and state action to reinforce parental authority. This distinction is crucial for resolving cases in which the interests of the child and parent are in conflict. Professor Tribe has noted that the state's interest in reserving certain decisions to the family is conceptually distinct from its interest in choosing which family member should have the authority to make a particular decision.[85] The authority of parents is grounded upon two fundamental assumptions: first, that parents possess what a child lacks in judgment and maturity, and second, that parents will act in the best interests of their children.[86] To the extent that these assumptions are unfounded, there is less support for the state interest in deferring to parents in matters concerning the family. These principles would seem to lead to the logical conclusion that there should be significant limitations on the state's power to reinforce parental dominance over mature and competent children. Moreover, state intervention is only warranted when the potential detriment to the child caused by remaining in the family in which the parents neglect or abuse him or her would be serious enough to overcome the substantial harm inevitably caused by disrupting or terminating the child's parental ties.[87]

While intervention in areas of juvenile delinquency and abuse and neglect may further state objectives, the other side of the coin is that such action also may unreasonably impair constitutionally protected interests of the child and parent. As long ago as 1923, the Supreme Court in *Meyer v. Nebraska*[88] declared that the Constitution protects

83. *See Developments in the Law, supra* note 3, at 1213-16. Under most circumstances, however, parents are better qualified than the state to promote the best interests of their own children. *See* J. GOLDSTEIN, A. FREUD AND A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973).

84. *See* Kaufman, *supra* note 15, at 1025-28; *Developments in the Law, supra* note 3, at 1213.

85. Tribe, *Toward a Model of Roles in the Due Process of Life and Law, Foreword to The Supreme Court, 1972 Term,* 87 HARV. L. REV. 1, 33-41 (1973).

86. *See Developments in the Law, supra* note 3, at 1219 & nn.139-40 (citing Parham v. J.R., 442 U.S. 584 (1979)).

87. *See* Areen, *supra* note 21, at 919; *Developments in the Law, supra* note 3, at 1237-38.

88. 262 U.S. 390, 401 (1923) (dictum).

the rights of minors as well as adults. Since that time, the Court has specified a wide variety of constitutional protections enjoyed by minors, including the right to equal protection against discrimination on the basis of race[89] or legitimacy,[90] the right to freedom of speech,[91] and to the procedural safeguards of due process in both criminal[92] and civil proceedings.[93] Most importantly, the due process clause protects the child from many forms of state interference with the family structure, on the ground that the child has a protectible interest in receiving constructive parental guidance.[94] As we shall see, in deciding cases involving the rights of children, courts have had to resolve two somewhat contradictory versions of the appropriate objective for guaranteeing the constitutional safeguards of children. On the one hand is the concept that, at least in areas touching upon fundamental rights, the child has a right to autonomous development. On the other is the notion that the child has the right to receive the benefit of parental guidance and control.

Parents also have constitutionally secured rights. The Supreme Court has recognized as fundamental the right of parental autonomy in activities relating to marriage,[95] procreation,[96] contraception,[97] abor-

89. Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

90. *See, e.g.,* Trimble v. Gordon, 430 U.S. 762 (1977) (disallowance of intestate succession from father); Jiminez v. Weinberger, 417 U.S. 628 (1974) (denial of social security benefits to some illegitimate children of disabled parents).

91. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (prohibition against wearing of black armbands in public school to protest United States involvement in Vietnam violated first and fourteenth amendments); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (compulsory pledge of allegiance to the flag violated first and fourteenth amendments).

92. *See, e.g.,* Breed v. Jones, 421 U.S. 519 (1975) (double jeopardy clause prevents prosecution in criminal court following adjudicatory proceedings in juvenile court); *In re* Winship, 397 U.S. 358 (1970) (proof beyond a reasonable doubt required when a juvenile was charged with an act that would be a crime if committed by an adult). *See also In re* Gault, 387 U.S. 1 (1967).

93. *See, e.g.,* Goss v. Lopez, 419 U.S. 565 (1975) (suspension from high school cannot be imposed without some rudiments of due process, including notice and a hearing); Garvey, *supra* note 51, at 779-83. The Court also has fashioned the boundaries of a minor's right to privacy, eliminating or modifying many state-imposed restrictions on access to abortions, *see* Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 428 U.S. 132 (1976), and to contraceptives, *see* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977), even where both the State and the parents oppose the exercise of the minor's choice.

94. *See, e.g.,* Smith v. Organization of Foster Families for Equality and Reform (OFFER), 431 U.S. 816, 842 (1977); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977).

95. *See* Zablocki v. Redhail, 434 U.S. 374 (1978).

96. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).

tion,[98] family relationships,[99] and the rearing and education of children.[100]

It is a commonplace that when a state seeks to regulate conduct falling within the ambit of fundamental rights, the state regulation is constitutionally permissible only when the statute may be justified by a compelling state interest, and the statute is restrictively drawn so as to further only that state interest.[101] Parens patriae laws are not different. Accordingly, highly generalized appeals to the characteristics of the young—presumed lack of competence and maturity—will not alone be sufficient to justify encroachment upon the fundamental rights of parent and child.[102] In *Wisconsin v. Yoder*,[103] for example, the Supreme Court held a state compulsory high school education statute unconstitutional on the ground that it denied Amish parents the right to raise their children in accordance with their religious principles. In *Yoder*, the Court ruled that the challenged statute did not serve a compelling police power or parens patriae objective because there was no showing of "harm to the physical or mental health of the child or to the public safety, peace, order or welfare."[104]

In sum, state parens patriae laws will not pass constitutional muster

97. *See, e.g.,* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965).

98. *See* Roe v. Wade, 410 U.S. 113 (1973).

99. *See* Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977).

100. *See, e.g.,* Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). The constitutional stature of rights concerning the family is most directly traced to these two cases. In *Meyer*, a schoolteacher challenged his conviction pursuant to a statute forbidding the teaching during the first eight grades of any modern language other than English. 262 U.S. at 396-98. In *Pierce*, the challenged statute required all children to attend public schools. 268 U.S. at 530. The Supreme Court found both statutes violative of due process as infringements of the liberty interest of parents in raising and educating their children.

Since *Meyer* and *Pierce*, courts have placed constitutional restraints on state interference with traditional family activities such as child-rearing. In Stanley v. Illinois, 405 U.S. 645 (1972), for instance, the Supreme Court held that a state may not deny an unwed father custody of his child without a hearing, noting that the integrity of the family unit has long been afforded constitutional protection and that the right to raise one's children is essential. *Id.* at 651. The Court has recognized family integrity as a fundamental right protected by the due process clause on two theories: as a "liberty" interest, *see* Comment, *supra* note 65, at 450 (citing *Meyer* and *Pierce*) and as a privacy right, *see* Roe v. Wade, 410 U.S. 113 (1973).

101. *See, e.g.,* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Prince v. Massachusetts, 321 U.S. 158 (1944). *See generally Developments in the Law, supra* note 3, at 1236.

102. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1079 (1978).

103. 406 U.S. 205 (1972).

104. *Id.* at 230.

if they encroach upon the fundamental right to family integrity,[105] unless the state can demonstrate that the statute in question is narrowly drawn to achieve a compelling state interest. A number of courts have struck down state parens patriae laws with this analysis. In *Roe v. Conn*,[106] a federal district court concluded that an Alabama child neglect statute providing for the termination of parental rights if the child "has no proper parental care" violated substantive due process. The court noted that the state can "sever entirely the parent-child relationship only when the child is subjected to real physical or emotional harm and less drastic measures would be unavailing."[107] There is growing recognition that the broad abuse and neglect statutes in force in many states are vulnerable to attack for failing to meet these requisites.[108]

While these guarantees set the basic contours for a fair and workable juvenile justice system, they are insufficient to bring about the needed reform. The constitutional limitations are in essence negative re-

105. If there is a fundamental right to family integrity, the question arises as to what kinds of family relationships are deserving of heightened constitutional protection. The substantive due process decisions upholding the basic rights of parents to direct the upbringing and education of their children have focused on the traditional role of the parents in these matters. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); Note, *Constitutional Limitations on the Scope of State Child Neglect Statutes,* 79 COLUM. L. REV. 719, 723 (1979). It might be argued, then, that the constitutional limitations on coercive state intervention into the family should apply only to the traditional immediate family. *Id.* at 722-27.

The Supreme Court appears to have rejected such a rigid limitation. In Moore v. City of East Cleveland, 431 U.S. 494 (1977), the Court stated that an extended family, consisting of a grandmother and her two grandsons, enjoyed the same constitutional protection from a local zoning ordinance as the immediate family. *Id.* at 504-06. In Smith v. Organization of Foster Families for Equality and Reform (OFFER), 431 U.S. 816 (1977), the Court concluded that the foster family serves the same interests as the traditional family. While the Court did not directly hold that foster parents have a liberty interest in the custody of their children protected by the fourteenth amendment, it did decide that even if they did have such a liberty interest, the challenged procedure for the removal of foster children was constitutional. *Id.* at 842-47. While the Court in *Moore* stressed that the extended family was firmly grounded in "history and tradition," 431 U.S. at 503-04, the Court in both *Moore* and *OFFER* viewed the family unit in question as the functional equivalent of the traditional family unit. Accordingly, it would seem that relationships serving the same functions as the traditional family deserve the same protection from state interference. *See Developments in the Law, supra* note 3, at 1216.

106. 417 F. Supp. 769 (M.D. Ala. 1976).

107. *Id.* at 779.

108. If the right to family integrity means the right to be free from coercive state intervention except where such intervention is necessary to promote the interests of the child, then the abuse and neglect statutes should be restricted to authorize intervention only where the demonstrable harm of nonintervention is greater than the ill effects of intervention.

straints. With the exception of the notice and hearing requirements of procedural due process, the constitutional limitations fail to provide juvenile authorities with guidelines for combating juvenile crime and child abuse. The constitutional guarantees leave many unanswered questions including: what procedures should be used, which decisionmakers should decide various categories of cases, and what remedies and sanctions should be available?

IV. TRANSLATING CONSTITUTIONAL GUARANTEES INTO MEANINGFUL REFORM

A. The Juvenile Justice Standards Project

1. Background

An effective and humane juvenile justice system must respond to the child's developmental needs by fostering the role of the family and also must protect those juveniles whose interests are threatened by their parents.[109] For the last ten years I have chaired the IJA-ABA Joint Commission of the Juvenile Justice Project. The Project, which has drawn upon the resources of leading psychiatrists, sociologists, penologists, family court judges, law professors, and practicing attorneys (including three former ABA presidents),[110] has long understood that piecemeal solutions cannot solve the problems of the juvenile justice system.

The efforts of the Joint Commission have produced twenty-three published volumes of substantive standards and a summary volume. The Commission dealt with the full range of issues such as detention, dispositions, sanctions, status offenses, abuse and neglect, and the procedures governing the adjudication of juvenile cases that are consistent with the basic constitutional guarantees of the child and parent. Summarizing the Standards in their entirety is beyond the scope of this article, and runs the risk of oversimplifcation and distortion. I will, however, outline a few of the innovations recommended by the Standards which could remedy many flaws in the juvenile justice system.

2. Rights of Minors

The problems stemming from the nearly unfettered discretion of those dealing with juveniles in trouble highlight the need for greater

109. Kaufman, *supra* note 15, at 1021.
110. *Id.* at 1018.

specificity of the rights of juveniles. A right has meaning only if its boundaries can be described. The Standards attempt to bring clarity to the vague generalities of the constitutional guarantees afforded minors by defining the boundaries of their rights. In the Rights of Minors volume, the Standards propose that "legislatively created, [and] narrowly drawn"[111] solutions be devised to address specific problems. In place of vague statutory generalities, uninfluenced by the conflicting interests of child, parent, and state, the Standards give detailed treatment to the scope of a minor's rights, such as the right to receive support,[112] to procure medical care in the absence of parental consent,[113] to obtain employment,[114] and to sign contracts.[115]

For example, tension between the interests of the parent and the interests of the child may occur in the context of the delivery of medical services. When the minor lives at home, his or her parents are likely to be sensitive to the needs of the child and provide for adequate treatment. But when he or she lives away from home, the adolescent has become an autonomous individual in society, and under the Standards, may consent to medical treatment as if he or she were an adult.[116] When the child remains at home, the Standards carefully delineate the circumstances in which he or she may receive medical treatment without prior parental notification or consent. Emergency treatment,[117] treatment for drug addiction,[118] venereal disease, contraception, and pregnancy,[119] are a few illustrations.

Through specific statutory provisions, the rights of juveniles and parents may be balanced and protected where vague constitutional guarantees are ineffective. At the same time, the Standards contain provisions which are responsive to the increasing maturity of the child as he or she progresses through adolescence. Deference to family autonomy is most clearly justified during the child's early years because the family cannot provide needed support unless it is aware of the

111. IJA/ABA STANDARDS, *supra* note 4, STANDARDS RELATING TO THE RIGHTS OF MINORS 2.1(B) (1980).
112. *Id.* at 3.1-.4.
113. *Id.* at 4.1-.9.
114. *Id.* at 5.1-.8.
115. *Id.* at 6.1.
116. *Id.* at 4.4.
117. *Id.* at 4.5. *See* Kaufman, *supra* note 15, at 1022.
118. IJA/ABA STANDARDS, *supra* note 4, STANDARDS RELATING TO RIGHTS OF MINORS 4.7 (1980).
119. *Id.* at 4.8.

child's illness.[120]

3. Abuse and Neglect

The interests of parent and child may of course conflict with greater impact when the parents are accused of abusing or neglecting the child. At first blush this appears to be the easiest case for state intervention. Here, the parents seem to have abrogated their responsibility for the healthy upbringing of the child. It would appear, therefore, that the state, as parens patriae, may justifiably intervene in the best interests of the child. The severity of the sanction of terminating the parent-child relationship and removing the child from his home, however, makes it imperative that the state observe strict procedural safeguards in abuse and neglect proceedings.

Drafting appropriate guidelines to govern coercive state intervention in the abuse and neglect area proved one of the most controversial and difficult tasks of the Project. While some commentators have advocated deference to the discretion and presumed expertise of judges and social workers in deciding when and how to intervene in cases of abused and neglected children,[121] others have concluded that broad, vague laws ultimately lead to haphazard intervention harmful to children.[122] The Standards, I believe, correctly perceive the dangers of both extremes. Recognizing that many children need state protection but that coercive intervention is not always the best treatment, the Standards on Abuse and Neglect attempt to provide a sound framework for coercive state intervention on behalf of abused or neglected children that is sensitive both to the needs of children and to the limits

120. *Id.* at 4.1. *See id.*, Commentary to 4.1, at 50. Moreover, a child during these years is less capable of protecting his own interests, and more in need of his parent's guidance. When a juvenile needs medical assistance because he or she has venereal disease or is pregnant, for example, the juvenile has, at least in a biological sense, achieved a certain level of maturity. Accordingly, the Standards recognize that in these circumstances, a requirement of parental consent would be inconsistent with the increasing maturity of the minor in trouble, and could result in a failure to obtain needed treatment. *Id.* at 4.8. *See id.*, Commentary to 4.8, at 72; Kaufman, *supra* note 15, at 1023; Note, *The Minors' Right to Abortion and the Requirement of Parental Consent,* 60 VA. L. REV. 305, 312 (1974). In structuring such compromises between the interests of parents and the interests of the child in various contexts, the reforms proposed by the Standards reflect the needs of both during the child's development. By adopting a flexible and pragmatic approach, the Standards recognize that no single solution is feasible for the myriad of circumstances in which the child may need the assistance of the law.

121. S. KATZ, supra note 22, at 64-65.

122. Mnookin, supra note 80, at 226.

of coercive intervention.[123]

The central tenet of the Standards on Abuse and Neglect is that a system of coercive intervention on behalf of endangered children should be based on a strong presumption in favor of family and parental rearing.[124] Judges and lawyers in New York note that the family court, at times unwittingly, contributes to family disintegration and juvenile crime by removing children from their homes and placing them in foster homes or institutions. Only when the child's welfare is endangered and interference is necessary for the child's protection may the state intervene against the parents' wishes.[125] This standard is consistent with the range of constitutionally permissible state actions to remedy the problems of child abuse and neglect: the state's parens patriae power justifies intervention only when the harm to the child of nonintervention outweighs the harm of intervention. Accordingly, the requirement of a showing of demonstrable harm to justify coercive intervention ensures that such action will be predicated upon a legitimate state interest.

The Standards also meet the void-for-vagueness concerns critics have raised with reference to many state abuse and neglect statutes. The Standards on Abuse and Neglect enumerate, with particularity, the statutory grounds for intervention. These include specific showings of physical harm or injury, emotional damage, sexual abuse, need for medical treatment, and delinquent acts by the child committed with parental encouragement or approval.[126] The Standards also seek to prevent decisionmakers from intervening simply because the child is from a culture with different values.

Included in the comprehensive scheme for state intervention are provisions for improvement in the reporting of child abuse,[127] emergency temporary custody of endangered children,[128] court-ordered provisions

123. IJA/ABA STANDARDS, *supra* note 4, INTRODUCTION TO STANDARDS RELATING TO ABUSE AND NEGLECT 2 (1981); Kaufman, *supra* note 15, at 1026.

124. IJA/ABA STANDARDS, *supra* note 4, STANDARDS RELATING TO ABUSE AND NEGLECT 1.1 (1981). *See id.*, Commentary to 1.1, at 49-50.

125. *Id.* at 1.2. *See id.*, Commentary to 1.2, at 50-51.

126. *Id.* at 2.1.

127. *Id.* at 3.1-.5. *See also* Bourne & Newberger, *"Family Autonomy" or "Coercive Intervention"? Ambiguity and Conflict in the Proposed Standards for Child Abuse and Neglect,* 57 B.U.L. REV. 671 (1977).

128. IJA/ABA STANDARDS, *supra* note 4, STANDARDS RELATING TO ABUSE AND NEGLECT 4.1-.4 (1981).

for services within the home, removal of the child,[129] criminal prosecution of parents,[130] and voluntary placement of an endangered child.[131] The greatest contribution of the Project, however, is the proposal of a comprehensive system based on three fundamental principles: (1) preference for preservation of family autonomy, (2) recognition of the primacy of the child's interest when it conflicts with the parents', and (3) coercive state intervention to remedy only specific harms.[132] The presumption in favor of family autonomy safeguards the parents' traditional right to custody and control of their child, and recognizes that the child is most likely to develop in the care of those who have raised him or her since birth. The Standards thus acknowledge the limits of law—that familial bonds cannot be easily replicated by a court-ordered substitute. But, it is to be noted, the Standards also recognize that deference to parental autonomy may not always be in a child's best interests: at times state intervention will be necessary and preferred to protect the child and, presumably, to interrupt the cycle through which the abused or neglected child ultimately grows up to become the abusive or neglectful parent.[133] Nearly half of the first-time delinquents in the New York Family Court have been there before, often as victims of child abuse or neglect and usually in cases not resolved by the court. Accordingly, the Standards must permit intervention in appropriate cases to ensure that today's abused child will not become tomorrow's criminal. The Standards' requirement that the court may intervene only in those cases in which the child has suffered specific harm should redress the major shortcoming of the abuse and neglect laws discussed above. Intervention, in the past, too frequently has been based upon highly subjective judgments concerning parental unfitness or improper home conditions without a requirement that the child is being or is about to be harmed.

4. Noncriminal Misbehavior

Most juvenile courts have jurisdiction over cases involving antisocial but noncriminal misbehavior, such as truancy, running away from home, incorrigibility, ungovernability or waywardness, idleness, and

129. *Id.* at 6.1-.6, 7.1-.5, 8.1-.7.
130. *Id.* at 9.1.
131. *Id.* at 10.1-.8.
132. *Id.* at 1.1, 1.2, 1.5. *See also* Bourne & Newberger, *supra* note 127, at 671.
133. *See* Bourne & Newberger, *supra* note 127, at 672.

habitual disobedience.[134] Studies indicate that as many as one-half of the cases heard in juvenile courts involve conduct that would not be punishable if committed by an adult. The juvenile court's jurisdiction over status offenders—so-called because jurisdiction is generally based upon the child's condition rather than on the commission of specific acts—rests on a number of dubious assumptions: that parents who turn ungovernable children over to the state are acting in the best interests of the child, that unruly children can be controlled through state intervention, that state action should at all times support parental authority over disobedient children, that noncriminal misbehavior by youths is likely to lead to future criminal behavior, and that coercive intervention will be an effective remedy.[135]

The argument advanced has been that minors have a right not to liberty but to custody; therefore, the state's intervention merely replaces the natural custody of parents.[136] This contention is not satisfying. For children, the rehabilitative ideal has been a chimera; the juvenile justice system has allowed as much juvenile crime to breed as it has prevented. For adolescents, this response is especially inadequate. According to the best contemporary evidence, moral and intellectual capacities do not change substantially after age fourteen.[137] This observation weakens the justification for blind deference to the interest of promoting the bonds of the family. The core interest of the juvenile remains his right to liberty, which is subject to extensive interference by the juvenile court in its exercise of status offense jurisdiction.

Ironically, the juvenile's liberty interest often is impaired more severely when the court treats him as a status offender than when he is treated as a juvenile delinquent. A recent study of New York's family court system confirms the pressing need to limit the jurisdiction of the juvenile court over status offenders and to develop guidelines for imposing sanctions.[138] Coupled with the absence of clear standards governing the imposition of sanctions, a problem addressed below, the dual responsibility of New York Family Court judges for status offenders and juvenile delinquents has led to the inequitable result that those

134. *See* Gregory, *Juvenile Court Jurisdiction Over Noncriminal Misbehavior: The Argument Against Abolition,* 39 OHIO ST. L.J. 242, 244 (1978).

135. IJA/ABA STANDARDS, *supra* note 4, INTRODUCTION TO STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR 3 (1982).

136. *See* Kaufman, *supra* note 6, at 1058.

137. *Id.*

138. Shipp, *Family Court: A Case of Troubled Justice,* N.Y. Times, Mar. 2, 1982, at 1, col. 1.

who commit minor noncriminal acts or status offenses often are treated more severely than those accused of delinquency. For example, the study found that New York Family Court judges placed under supervision nine percent of the youngsters charged with status offenses such as truancy or failure to obey their parents, nearly twice the number of adjudicated delinquents placed under supervision.[139] In 1980, only 2.18% of all juvenile delinquents appearing in New York Family Court were placed in secure institutions.

The Standards provide a solution to these problems by proposing the elimination of status offense jurisdiction now vested in juvenile courts and substitution of largely voluntary referral services outside the juvenile justice system.[140] The principal problems underlying status offenses, such as disobedience of parents and running away from home, are more likely to be solved by a comprehensive system of investigation, referral and counseling than by the piecemeal adjudication of offenses that now seem to end in a cul-de-sac. By positing that services can be most effectively provided at the onset of the problem, the Standards attempt to reach problem children while they can still be assisted, rather than weeks or months later in a formal proceeding and long after attitudes and positions have hardened.[141]

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139. *Id.* This phenomenon may be explained in part by the fact that evidence may be admissible at a PINS hearing that would not be admissible in the trial of a delinquent, and also because a lower standard of proof is required than the reasonable doubt standard made applicable by *Winship* to juvenile delinquency proceedings. IJA/ABA STANDARDS, *supra* note 4, INTRODUCTION TO STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR 7 (1982).

140. *Id.* at 1.1. *See id.*, Commentary to 1.1, at 35-41.

141. In keeping with the presumption favoring family autonomy, and the pragmatic recognition that people cannot be coerced into rehabilitation, *see* Kaufman, *supra* note 28, at 1470-71, the Standards recommend that all crisis intervention and other services should be offered on a voluntary basis. The juvenile and the family cannot be compelled to receive such services in cases involving unruly and antisocial behavior which does not violate the criminal law. The Standards, of course, recognize that there are some cases in which limited state intervention is desirable for the health and protection of the child. Youths who run away and lack even a temporary haven, children who are in immediate jeopardy, and those who require emergency medical services are prime candidates for such attention. In such cases, the Standards permit procedures for temporary custody to evaluate or treat, while precluding a determination of wardship which would permit prolonged detention. IJA/ABA STANDARDS, *supra* note 4, Standards Relating to Noncriminal Misbehavior 6.1-.7 (1982). Such provisions carve out only limited exceptions to the principle that rehabilitation can be best carried out in the context of the family, and recognize the inherent limitations of confinement of juveniles in secure or jail facilities for noncriminal misbehavior. Confinement is frequently less effective than other measures, is costlier than other procedures, leads to isolation, family breakdown and destruction of self-image, and often exacerbates the problems that lead to juvenile delinquency. Gilman, *IJA/ ABA Juvenile Justice Standards Project: An Introduction,* 47 B.U.L. REV. 617, 624 (1977).

In addition to eliminating status offense jurisdiction, the Standards offer other proposals for improving the juvenile justice system's ability to deal fairly with the problem of juvenile criminality. In 1977, the Standards suggested prohibiting the imposition of sanctions for "conduct that is not intended to cause, and does not cause or risk, injury to the personal or property interests of another."[142] The Standards seek to place strict limitations on the duration of the state's intervention into the lives of children in trouble.[143] This approach marks a significant improvement in the traditional model of juvenile justice, which has used indeterminate sentencing to retain state control over the juvenile until he is "cured" or until he reaches the age of majority.[144] The Standards structure a scheme of determinate sentencing, based on the principle that the severity of the sanction must be proportionate to the seriousness of the offense.[145] If adopted, these innovations would provide the most comprehensive study for reform and the basic framework for a juvenile justice system in which intrusive dispositions are kept to a minimum. Juvenile officials, however, retain the authority to intervene to protect society from dangerous youngsters and children from cruel parents.

Moreover, there is a great need for serious reexamination of the secrecy requirement in juvenile and family courts. In New York, as in most states, a minor's criminal record and other court records are kept secret because the state law is based on the premise that confidentiality is necessary for the minor's rehabilitation. Secrecy is so pervasive in the system that all participants, from the policeman and the teacher to

142. IJA/ABA STANDARDS, *supra* note 4, STANDARDS RELATING TO JUVENILE DELINQUENCY AND SANCTIONS 2.4 (Tent. ed. 1977) (omitted in 1980 draft). *See* Kaufman, *supra* note 15, at 1030.

143. IJA/ABA STANDARDS, *supra* note 4, STANDARDS RELATING TO JUVENILE DELINQUENCY AND SANCTIONS 5.2, 6.2 (1980). *See* Kaufman, *supra* note 15, at 1030.

144. *See* Kaufman, *supra* note 15, at 1030-31 & 1031 n.100.

145. IJA/ABA STANDARDS, *supra* note 4, STANDARDS RELATING TO JUVENILE DELINQUENCY AND SANCTIONS 5.1-.2 (1980). *See id.* § 6.2 (Tent. ed. 1977). Moreover, in choosing a particular sanction, the juvenile court judge is directed to select the least restrictive or drastic alternative appropriate to the seriousness of the offense. *Id.*, STANDARDS RELATING TO DISPOSITIONS 2.1 (1980). If the judge imposes a restrictive disposition in a case involving a juvenile offender, he or she must state in writing the reasons for the finding that less drastic remedies are inappropriate or inadequate to further the purposes of the juvenile justice system. *Id.*, Commentary to 12.D, at 22 (Tent. ed. 1977). Finally, the Standards establish strict criteria for the waiver of juvenile court jurisdiction in order to regulate the transfer of juveniles who commit serious criminal offenses to adult criminal court. *Id.*, STANDARDS RELATING TO TRANSFERS BETWEEN COURTS (1980).

the judge, are kept in the dark over the record of the child's criminal conduct in the other official's possession. The argument for confidentiality is persuasive in cases of noncriminal misbehavior or abuse and neglect, where the state is not attempting to punish a child for serious antisocial conduct. When an adolescent has committed a crime, however, society's interest in full information is deserving of much greater protection. Accordingly, information relating to juvenile delinquency adjudications should not be withheld from judges who must shape dispositions responsive to all the interests at stake or from school officials who are responsible for dealing with the troubled child in the school environment. Increased access to information concerning juvenile crimes would help relieve one central shortcoming of the present system. In sum, the juvenile justice system's left hand does not seem to know what its right hand is doing.

B. Proposals for Reform

The discussion of constitutional and statutory reforms highlights one central theme—that all actions taken by society in addressing the problems of the juvenile involve a delicate balance among the interests of child, parent, and state. The need for such balancing arises in all types of cases, including abuse and neglect and juvenile delinquency proceedings, and at all stages of the process through the intake stage to the dispositional or sentencing stage. The uniform application of a set of clear standards to further society's interests in reducing the incidence of child abuse and juvenile crime requires an institutional framework capable of identifying the problems of those brought before them, gathering and applying relevant information, and coordinating the resources allocated to juvenile justice. Critics have universally asserted that the underlying structural weakness of the juvenile justice system is a lack of coordination. This lack of coordination has infected all aspects of the juvenile process. There is confusion in the roles and responsibilities of judges, social workers, counsel, service agencies and other personnel. There are gaps in jurisdiction and defects in the delivery of services. This contributes heavily to the failure to achieve the twin objectives of protecting society from juvenile crime and helping children and their families.[146] The story of the seventeen-year-old murderer, which I briefly mentioned at the outset, is a tragic but accu-

146. *Id.*, Introduction, at 3 (Tent. ed. 1977).

rate illustration of the shortcomings of a system that allows juvenile offenders and neglected children to pass through the cracks of the juvenile justice labyrinth because of its lack of coordination. In that case, the juvenile officials who treated him as an emotionally disturbed child and the officials charged with the responsibility of dealing with him as a juvenile offender were working in complete isolation. Furthermore, his family was not involved in the process because he became so incorrigible that they no longer wanted any communication with him. Tragically, the murder followed his release from custody upon the recommendation of psychiatrists and social workers.

What is needed is institutional change to develop inter-connections within the system for the purposes of eliminating gaps and duplication in services and coordinating the operation and monitoring of all programs affecting the juvenile. New York City Schools Chancellor Frank J. Macchiarola has stressed the need for coordination between the schools and juvenile agencies. The schools cannot achieve this goal alone. It is difficult enough for schools to serve educational needs, let alone combat juvenile crime and child abuse. Others suggest reforms which would add a new program—such as vocational counseling, drug and alcohol prevention programs, or psychological counseling—to the disparate segments of the existing system.

The linchpin of comprehensive reform, I believe, would be the creation of a unified administrative agency either as an adjunct to the juvenile court or to the concerned agency. It would coordinate society's remedial efforts in all aspects of the child's interaction with the legal and social structure. One of the shortcomings of the present system is the poorly defined roles of the participants in the system. At the present time, it is unclear whether social workers and psychiatrists are to serve only the interests of the child (and if so, whether that interest is liberty or a right to treatment), or whether they have been charged with a responsibility to society as well. The assignment of counsel to children in light of *Gault* and its progeny raises similar questions about the efficacy of counsel for individuals whose betterment may not necessarily be effectuated by lawyers accustomed to the adversary system and advocacy of narrowly defined legal rights. Judges themselves are often too over-burdened by the pressures of heavy caseloads to have sufficient time to devise dispostions that truly serve the rehabilitative and other goals of the juvenile justice system. In short, there is a pressing need to place substantial responsibility in the hands of neutral and dis-

passionate individuals sensitive to the oftentimes conflicting interests of child, parent, and state. Officials are needed who can play a crucial role at the initial stage of a juvenile's contact with the system and involve the family in the process of rehabilitation.

Accordingly, I would suggest that as a first step, juvenile cases should be assigned to a select group of officials acting as supervisors or coordinators within this unified juvenile justice system. Trained impartial coordinators often can encourage solutions that cannot be achieved when parties with opposing views interact by themselves. A family with a child who is a suspected juvenile offender may not be receptive to suggestions from social workers or juvenile judges because they are embarrassed that they have a problem child, or they may perceive that the social worker is only the advocate of the child's interests. As a result, these coordinators could serve as intermediaries whose proven neutrality would allow them to suggest and negotiate dispositions acceptable to all the parties, including the families in whose care the problem child is most likely to remain. To ensure the selection of individuals who have the confidence of the public, I would suggest that they be appointed by the Governor on the recommendation of a panel or commission which would be composed of individuals from many disciplines, including the legal profession, the social sciences, government, and law enforcement.

The use of coordinators in many types of cases would help relieve the pressures on overburdened courts. In his Annual Report on the State of the Judiciary, Chief Justice Burger recently suggested that there is a pressing need to find "alternate dispute-solving methods" in child custody, adoption, and divorce cases, among others, to reduce the flood of litigation in the courts. My proposal offers a concrete means of achieving this goal.

The present crisis in our nation's family and juvenile courts suggests that substantial responsibility or authority over a broad range of matters should be vested in the centralized oversight mechanism recommended. The coordinators should have original jurisdiction over cases of abuse and neglect, proceedings in which it is likely that there will be a battle for custody of a child, and cases involving status offenders such as truants and others enumerated. These are all instances in which the appropriate focus is necessarily the family, and the coordinators could serve an important function in attempting to devise a solution within the family context. The courts could exercise judicial review over the

institution's decisions, as courts do over administrative agencies, to determine whether the agency's action is arbitrary and capricious.[147] If the juvenile in trouble has repeated contact with the law, the coordinator will have become familiar with the problems facing both the child and the family. Accordingly, continued responsibility may yield the expertise required for suggesting successful measures for rehabilitation. Even in cases involving crimes over which the courts could retain original jurisdiction, the suggested special agency's staff could discuss the child's problems with the family and make a recommendation to the courts for an appropriate disposition.

The countless continued and persistent failings of the juvenile justice system make clear one fundmental truth: that forced intervention is doomed to fail when it involves efforts to coerce compliance with standards of behavior defined by the coercer alone.[148] What must be found is a way to convince troubled children and families that they are an important part of the process of their own rehabilitation. The coordinator—a label we attach temporarily—could rely on special tools to help troubled children and families chart their own destiny. Perhaps the most serious fallacy in efforts to remedy the problems of child abuse and juvenile criminality is the assumption that these problems could be solved merely through post hoc intervention by the state. Such belated action results in a determination that an individual's behavior is socially unacceptable, but history teaches that it would not offer a prescription for future behavior based on the consent of all involved.

To redress this shortcoming, I would suggest that the coordinator to whom a case has been assigned, a case which involves abuse or misconduct not warranting removal of the child or institutionalization, work with the family in devising a "contract" or "agreement" specifically setting forth the terms of permissible and impermissible behavior. The coordinator would first discuss the problem with the parents and the juvenile to expose fully the roots of the difficulty—whether neglect, child abuse, antisocial behavior by the juvenile, or rebellion and so forth. This discussion should reveal areas of agreement and disagreement. Acceptable arrangements could be reached on curfews, responsi-

147. E.I. DuPont de Nemours & Co. v. Train, 541 F.2d 1018, 1026 (4th Cir.), *aff'd in part, rev'd in part on other grounds,* 430 U.S. 112 (1977) (citing the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1976)).

148. *See* Kaufman, *supra* note 28, at 1470-71.

bilities of parents, parents' expectations for the child, and other concerns. An agreement, memorialized in written form, could set up schedules for visitation if parents separate, and set forth restrictions on parents in abuse and neglect cases. This process of discussion and negotiation would encourage the juvenile to play an active role in suggesting terms of the agreement. He would acquire the feeling that he is a part of the system at work, and be less inclined to rebel against authority. By articulating his needs, the juvenile would permit the coordinator to draft provisions fashioned in light of both the juvenile's suggestions and the realistic limits of the parents.

Thus, the agreement may serve a number of functions. The drafting process itself is beneficial in discussing misunderstandings, venting anger, and communicating expectations. Once memorialized in writing, the agreement forces parents to act consistently with the express terms, provides the juvenile with a clearer sense of his freedoms and limitations voluntarily agreed to, and preserves a record of the case in the event that the juvenile must return to the coordinator or court. Of course, the agreement could be modified should circumstances change. In such a system, the state would not simply be coercively intervening in the family, but would be providing a means of structuring a mutual agreement between members of a troubled family.

The use of coordinators and family contracts can provide an important first step to correct a crazy-quilt juvenile justice system. After all is said in debates, there still remains the basic principle that the child must learn to cope as a member of a society that expects him or her to function as a responsible person. In some instances this requires support of the family and other institutions to guide the minor's development. In still other cases, the state must intervene to protect the juvenile from those who endanger his or her interests. Through the constitutional, statutory, and institutional reforms I have discussed, society can achieve the delicate balancing of interests.

We can be sure of one thing—the present disjointed and uncoordinated system has proven its inability to cope with the growing criminal and non-criminal problems of our adolescents. The suggestions proposed in the Juvenile Justice Standards and here may offer a glimmer of hope for leading us from the dense thicket of our depressing failures.

Of course, there are no guarantees. But, as Learned Hand phrased it:

> By some happy fortuity, man is a projector, a designer, a builder, a craftsman; it is among his most dependable joys to impose upon the

> flux that passes before him some mark of himself, aware though he always must be of the odds against him. His reward is not so much in the work as in the making; not so much in the prize as in the race.[149]

If our commitment is firm, the dream of juvenile justice reform may yet become a reality.

149. L. HAND, *A Fanfare for Prometheus,* in THE SPIRIT OF LIBERTY 291, 297 (I. Dilliard ed. 1960).